

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS KEITH JENKINS,

Defendant-Appellant.

UNPUBLISHED

September 30, 2008

No. 280197

Oakland Circuit Court

LC No. 2006-212267-FH

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of taking possession of and driving away a motor vehicle, MCL 750.413, one count of malicious destruction of property, MCL 750.377a(1)(b)(i), one count of third-degree fleeing and eluding, MCL 257.602a(3), one count of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), and one count of driving with a suspended or revoked driver's license, second offense, MCL 257.904(3)(b). He was sentenced as a fourth habitual offender, MCL 769.12, to 116 days in jail for the driving with a suspended license conviction and 19 to 360 months' imprisonment for each remaining conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On December 9, 2006, Rich and Amy Nastaw saw an unidentified individual drive Amy's truck away from the couple's condominium. They immediately reported the incident to the police. Shortly thereafter, Officer Anthony Bateman saw the stolen truck being driven and engaged in pursuit. A few seconds later, the driver jumped from the still-moving vehicle and began running. Bateman and another officer pursued defendant on foot and eventually apprehended him.

Officer Bateman had a video camera in his patrol car, and his initial attempt to stop the truck was captured on tape. The police transferred the tape to a DVD for use at trial. During the trial, it was discovered that the transfer was unsuccessful and the DVD could not be shown.

On appeal, defendant argues that his trial counsel was ineffective for failing to request an adjournment to determine if the original videotape could be obtained or, alternatively, for failing to request an adverse inference instruction. Because defendant failed to raise this claim below in a motion for a new trial or a request for an evidentiary hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish a claim of ineffective assistance of counsel, a defendant

must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. [*People v Horn*, 279 Mich App 31, 37 n 2; ___ NW2d ___ (2008) (citations omitted).]

The prosecutor must produce at trial all evidence bearing on the defendant's guilt or innocence that is within the prosecutor's control. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Here, the prosecutor was unexpectedly unable to produce the videotape recording from the police car. It appears that trial counsel did not seek to obtain the original tape as a matter of strategy. Because the tape was not admitted, defense counsel was able to argue that the missing tape would have "clear[ed] this entire situation up for us in that it would have taken the pictures of the alleged suspect," whoever it might have been, and "possibly could have cleared my client" of the charges against him. Defendant has failed to overcome the presumption that counsel's strategy was reasonable.

Further, defendant has not shown that he was prejudiced by any error. Officer Bateman testified that he observed the driver leaving the truck and noticed that he was wearing "a dark outfit and he had a lighter shirt underneath and he had gloves on." He pursued the driver from the truck to the point of apprehension, losing sight of him for no more than a few seconds at a time. When defendant was apprehended, he was wearing a dark sweatshirt over another shirt and had gloves on. Officer Bateman recognized them as the same articles of clothing the driver was wearing when he fled from the truck. Further, Officer Bateman testified that defendant was clearly visible on the tape as the fleeing driver. Because nothing in the record suggests that the tape would have shown anyone other than defendant, it is not reasonably likely that the verdict would have been different had the tape been obtained and presented at trial.

Counsel's decision whether to request a particular instruction is generally a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). We will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). An adverse inference instruction for missing evidence is only required where the defendant has shown that the prosecutor acted in bad faith in failing to produce the evidence. *Davis, supra* at 514–515. The record clearly showed that the prosecutor intended to introduce the recording and her failure to do so was inadvertent. Further, as discussed previously, there was nothing in the record to suggest that the tape would have benefited defendant. Therefore, a request for an adverse inference instruction would have been futile and defense counsel was not ineffective for failing to make a futile motion or argument. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher